Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

CLAUDUS G. SMITH,

Petitioner,

v.

ANTHONY J. PRINCIPI,
Secretary of Veterans Affairs,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Mr. Smith is a blind veteran seeking to recover the full value of past-due disability benefits which the Department of Veterans Affairs ("VA") erroneously withheld from him for over thirty years. Specifically, while the VA assigned Mr. Smith a 70% disability rating for service-connected blindness in 1961, the Board of Veterans' Appeals concluded in 1993 that it was "clear and unmistakable error" for the VA not to have assigned Mr. Smith a 100% disability rating in 1961. However, when the VA did finally pay Mr. Smith his past-due disability benefits, it merely paid him the amounts (more than $200,000) that were due at the time that they should have been paid -- the VA did not adjust the benefits to account for the effects of the passage of time on their value. Although Mr. Smith argued that applicable veterans benefits statutes clearly authorize the payment of interest in cases of administrative error (38 U.S.C. § 503(a)) and clearly require the payment of interest in cases of clear and unmistakable error (38 U.S.C. § 5109A), the court below concluded that, because the word "interest" is absent from these statutory provisions, sovereign immunity bars recovery of the adjustment sought by Mr. Smith. Accordingly, Mr. Smith respectfully submits the following questions for review:

1. Whether the court of appeals erred in holding that the payment of interest is not authorized by 38 U.S.C. § 503(a) or required by 38 U.S.C. § 5109A in veterans benefits cases.

2. Whether the court of appeals erred in holding that the canon of statutory construction requiring the liberal interpretation of veterans benefits statutes must yield to the canon disfavoring waivers of sovereign immunity for interest.

3. If the "no-interest rule" of sovereign immunity would otherwise preclude Mr. Smith's recovery of interest in the egregious

circumstances of this case, whether this Court should create an additional exception to the rule and permit the payment of interest under 38 U.S.C. § 503(a) and 38 U.S.C. § 5109A.

PARTIES

All parties to the proceedings below are identified in the caption, *supra*. *See* Sup. Ct. R. 14.1(b)

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PETITION FOR WRIT OF CERTIORARI

Claudus G. Smith respectfully petitions the Court for the issuance of a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") in this case.

OPINIONS BELOW

The opinion of the Federal Circuit (Appendix ("Apx") 1) was entered on March 4, 2002, and is reported at 281 F.3d 1384 (Fed. Cir. 2002). The opinion of the U.S. Court of Appeals for Veterans Claims (Apx 7) was entered on December 22, 2000, and is reported at 14 Vet. App. 227 (2000). The decision of the Board of Veterans' Appeals (Apx 15) was entered on December 16, 1997.

JURISDICTION

The judgment of the Federal Circuit was entered on March 4, 2002. This Court has jurisdiction under 28 U.S.C. § 1254(1)

PERTINENT STATUTES

The relevant statutory provisions are 38 U.S.C. § 503(a) and 38 U.S.C. § 5109A. 38 U.S.C. § 503(a) provides as follows:

> (a) If the Secretary determines that benefits administered by the Department have not been provided by reason of administrative error on the part of the Federal Government or any of its employees, the Secretary may provide such relief on account of such error as the Secretary determines equitable, including the payment of moneys to any person whom the Secretary determines is equitably entitled to such moneys.

38 U.S.C. §5109A provides in relevant part as follows:

> (a) A decision by the Secretary under this chapter is subject to revision on the grounds of clear and unmistakable error. If evidence establishes the error, the prior decision shall be reversed or revised.
>
> (b) For the purposes of authorizing benefits, a rating or other adjudicative decision that constitutes a reversal or revision of a prior decision on the grounds of clear and unmistakable error has the same effect as if the decision had been made on the date of the prior decision.

STATEMENT OF THE CASE

1. THE VA'S CLEAR AND UNMISTAKABLE ERROR

The facts of this case are not disputed.[1] Mr. Smith, who is now totally blind, served in the U.S. Air Force from May 1950 to May 1954 and from November 1955 to August 1957. In a February 26, 1958 rating decision, the VA granted Mr. Smith a 70% disability rating, effective August 24, 1957, for chorio-retinal eye degeneration. The VA re-examined Mr. Smith on February 2, 1961 and diagnosed him with "gun barrel vision of 5 degrees bilateral secondary to Retinitis Pigmentosa." As the VA later agreed, the pertinent regulations clearly required the VA to assign Mr. Smith a 100% disability rating as a result of this diagnosis. Nevertheless, on May 16, 1961 the VA continued Mr. Smith's disability rating at 70%.

Thirty-two years later, pursuant to a claim submitted by Mr. Smith, the Board ruled on April 13, 1993 that the VA's May 16, 1961 rating decision contained clear and unmistakable error and that Mr. Smith was entitled to a 100% disability rating for chorio-retinal eye degeneration and had been so entitled since February 2, 1961. The VA awarded Mr. Smith additional special monthly compensation, retroactive to February 2, 1961, for blindness in both eyes with visual acuity of 50/200 or less; the VA also awarded Mr. Smith special monthly compensation, retroactive to November 8, 1991, for blindness in both eyes having light perception only. This award of over thirty years of past-due benefits, which totaled $203,497.31, merely included the amounts that were due at the time that they should have been

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[1] The facts set forth herein are taken from the recitation of facts contained in the December 22, 2000 opinion of the U.S. Court of Appeals for Veterans Claims. *See* Apx 8-9. *See also* Apx 1, 17-18.

paid and did not include interest or any other adjustment to account for the effects of the passage of time on their value.

Subsequently, in a March 26, 1994 letter to the VA, Mr. Smith requested that interest be added to the past-due benefits awarded in April 1993. In an April 22, 1994 letter responding to and rejecting Mr. Smith's request, the VA Regional Office ("VARO") in Muskogee, Oklahoma stated that VA regulations "do not provide for interest to be paid on retroactive awards." On February 26, 1996, Mr. Smith again wrote to the VA and requested interest on his past-due benefits. The Muskogee VARO responded on March 5, 1996 and again rejected Mr. Smith's request. When Mr. Smith wrote to the VA again on April 14, 1996 and challenged this disposition of his request, the VA accepted this letter as a Notice of Disagreement. The Muskogee VARO on October 29, 1996 denied Mr. Smith's claim for interest and he timely filed an appeal of the VARO's ruling to the Board of Veterans' Appeals.

2. THE DECISION OF THE BOARD OF VETERANS' APPEALS

On December 16, 1997, the Board of Veterans' Appeals ("Board") dismissed Mr. Smith's appeal, ruling that it lacked jurisdiction to consider his claim because it believed there was no statute authorizing the VA's payment of interest on awards of disability compensation. Apx 18-19. Mr. Smith timely filed an appeal of the Board's decision to the U.S. Court of Appeals for Veterans Claims on February 11, 1998.[2]

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[2] The U.S. Court of Appeals for Veterans Claims was formerly called the U.S. Court of Veterans Appeals.

3. THE DECISION OF THE COURT OF APPEALS FOR VETERANS CLAIMS

On December 22, 2000, the U.S. Court of Appeals for Veterans Claims ("CAVC") affirmed the Board's decision.[3] The CAVC found that the Board had erroneously dismissed Mr. Smith's claim for lack of jurisdiction because, "[i]f the Board had liberally framed the issue in terms of whether the appellant had received the maximum monetary award to which he was legally entitled, including interest, or whether there were any amounts omitted in the calculation of the past-due benefits, including interest, the claim would have been within the Board's jurisdiction." Apx 10.

Regarding the merits of Mr. Smith's appeal, the CAVC stated that "[t]he payment of interest on past due benefits is a case of first impression before this Court." *Id.* The CAVC then rejected Mr. Smith's claim, holding that "there is no statutory authority under which the Secretary may pay the veteran interest on [ ] past due benefits." Apx 12. The CAVC further held that, "[e]ven if the Secretary were inclined to grant the veteran equitable relief, he would not lawfully be permitted to do so" because "there is no statute or regulation that authorizes the Secretary to pay interest on past due benefits under any circumstances, to include the exercise of his equitable powers." Apx 13. The CAVC therefore held that Mr. Smith had not demonstrated that the Board had committed either legal or factual error that would warrant reversal or remand regarding the payment of interest on the past-due benefits. Apx 14.

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[3] The CAVC acknowledged that it had jurisdiction over Mr. Smith's appeal pursuant to 38 U.S.C. § 7252(a) and 7266(a). Apx 7.

4. THE DECISION OF THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT

On March 4, 2002, the Federal Circuit affirmed the CAVC's decision.[4] The Federal Circuit's decision was narrowly grounded upon the absence of the word "interest" from 38 U.S.C. § 503(a) and 38 U.S.C. § 5109A:

> We conclude that there has been no waiver of the no-interest rule in § 503(a) or § 5109A(b). . . . Neither statute mentions interest, and that deficiency is controlling in this case. A waiver of the no-interest rule must be express. [Citations omitted.] Accordingly, a statute's broad reference to "equitable relief" does not constitute a waiver of the no-interest rule. [Citation omitted.] Furthermore, ambiguity in a statute cannot constitute a waiver. [Citation omitted.] Applying these principles to the statutes at issue, it is clear that § 503(a)'s reference to "equitable" relief cannot be a waiver of the no-interest rule. Similarly, § 5109A(b)'s "same effect" language, which is at best ambiguous as to whether it refers to missed benefit payments only or missed benefit payments plus interest, is likewise not a clear waiver of the no-interest rule.

Apx 3-4. The Federal Circuit also rejected Mr. Smith's "invocation of the canon of statutory construction in favor of veterans," holding that it "must similarly yield to the canon of statutory construction strictly disfavoring a waiver of the no-interest rule absent an express indication to the contrary." Apx 4. Finally, the Federal Circuit stated that Mr. Smith's case was not analogous to the recognized exceptions to the no-interest rule and he was not equally worthy of an award of interest. Apx 5-6.

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[4] The Federal Circuit acknowledged that it had jurisdiction over Mr. Smith's appeal pursuant to 38 U.S.C. § 7292. Apx 2.

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

This Court has not addressed whether veterans who have suffered an administrative error -- or, more egregiously, a "clear and unmistakable error" -- by the VA may seek an award of interest on past-due benefits under 38 U.S.C. § 503(a) ("Section 503(a)") or 38 U.S.C. § 5109A ("Section 5109A"). Veterans such as Mr. Smith who become disabled in the course of military service occupy a vulnerable and unenviable position: they must rely upon an enormous, byzantine Federal agency to provide disability benefits that are often necessary for survival. The quality of the lives of disabled veterans and their families has a direct correlation with the ability, or inability, of the VA to deliver on the Government's promise of liberal disability benefits for servicemembers.[5] Disabled veterans thus represent a special class of citizens that should command the attention of the courts when the VA has erroneously withheld such benefits -- particularly here, where the VA's thirty-year error spanned the heart of Mr. Smith's adult life.

The Federal Circuit's conclusion that, under the current statutory scheme, disabled veterans may *never* be made whole from such errors through an award of interest merits this Court's review. As discussed below, (1) the Federal Circuit

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[5] The promise of liberal disability benefits also forms part of the basis for the preclusion of Government tort liability to servicemembers under the *Feres* doctrine. *See United States v. Johnson*, 481 U.S. 681, 684 n.2 (1987) (stating that one of the three rationales underlying this doctrine is that "'the Veterans' Benefits Act establishes, as a substitute for tort liability, a statutory 'no fault' compensation scheme which provides generous pensions to injured servicemen, without regard to any negligence attributable to the Government'") (*quoting Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 671-72 (1977)). Having precluded tort liability to its servicemembers partly in exchange for a compensation scheme of generous disability benefits, any subsequent attempt by the Government to renege upon its promise of generosity should present a compelling case for judicial review.

erroneously concluded that the VA is not authorized under Section 503(a) or required under Section 5109A to pay interest, (2) the Federal Circuit erroneously concluded that the canon of statutory construction requiring the liberal interpretation of veterans benefits statutes must yield to the canon disfavoring waivers of sovereign immunity for interest, and (3), if the no-interest rule would otherwise preclude Mr. Smith's recovery of interest in the egregious circumstances of this case, this Court should create an additional exception to the rule and permit the payment of interest under Sections 503(a) and 5109A.

1. IN HOLDING THAT THE VA IS NOT AUTHORIZED TO PAY INTEREST IN CASES OF ADMINISTRATIVE ERROR, OR REQUIRED TO PAY INTEREST IN CASES OF CLEAR AND UNMISTAKABLE ERROR, THE FEDERAL CIRCUIT ERRONEOUSLY DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

The Federal Circuit based its decision principally upon the absence of the word "interest" from Sections 503(a) and 5109A. "Neither statute mentions interest, and that deficiency is controlling in this case." Apx 4. However, in concluding that Congress has not waived sovereign immunity for the payment of interest in these statutes, the Federal Circuit failed to accord the provisions their plain meaning and full import. The Federal Circuit also failed to consider the congressional intent and policies underlying Sections 503(a) and 5109A and veterans benefits statutes in general. Properly construed, Section 503(a) *authorizes* the payment of interest in cases of administrative error and Section 5109A *requires* the payment of interest in cases of clear and unmistakable error.

Section 503(a) broadly authorizes the Secretary to provide *any* form of relief, including "the payment of

moneys," to a claimant where, as here, the VA denied benefits through administrative error:

> (a) If the Secretary determines that benefits administered by the Department have not been provided by reason of administrative error on the part of the Federal Government or any of its employees, the Secretary may provide *such relief on account of such error as the Secretary determines equitable, including the payment of moneys* to any person whom the Secretary determines is equitably entitled to such moneys.

38 U.S.C. § 503(a) (emphasis added). By specifically authorizing the Secretary to grant any equitable monetary relief, Congress clearly authorized the Secretary to pay interest.[6] Undeniably, interest is equitable; it is monetary; and it is relief. To interpret Section 503(a) as somehow excluding interest defies the plain meaning of the statute. Moreover, it is contrary to the canon, articulated by this Court, that "provisions for benefits to members of the Armed Forces are to be construed in the beneficiaries' favor." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991). *See also Brown v. Gardner*, 513 U.S. 115, 118 (1994) (referring to "the rule that interpretive doubt is to be resolved in the veteran's favor"). Indeed, since Congress is presumed to be aware of such canons of statutory construction, it must be presumed that Congress intended that this provision -- directed at the *correction* of administrative *error* in the dispensation of veterans benefits -- would be given maximum beneficial effect to ensure that aggrieved beneficiaries could be made whole.[7] There also is no language in Section 503(a)

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[6] It should be noted that Section 503(a) does not itself *require* the payment of interest; it merely *authorizes* the Secretary to do so in appropriate cases, including through the promulgation of regulations directed at specific recurring circumstances.

[7] Congress has expressed concerns with the VA's high error rate and the long delays in processing claims. For example, in the proposed

or any other pertinent veterans benefits statute that would conflict with or be rendered meaningless or superfluous by Section 503(a) if it is interpreted to authorize the payment of interest.

Section 5109A addresses a special type of administrative error -- specifically, the unique circumstances where the VA has withheld veterans benefits due to a "clear and unmistakable error." A clear and unmistakable error is a rare and particularly egregious error that cries out for complete redress. The Board's regulations define such an error as follows:

> Clear and unmistakable error is a very specific and rare kind of error. It is the kind of error, of fact or of law, that when called to the attention of later reviewers compels the conclusion, to which reasonable minds could not differ, that the result would have been manifestly different but for the error.

38 C.F.R. § 20.1403(a). *See also Russell v. Principi*, 3 Vet. App. 310, 313-14 (1992) (stating that clear and unmistakable error is "the sort of error which, had it not been made, would have manifestly changed the outcome . . . [, an error that is] undebatable, so that it can be said that reasonable minds could only conclude that the original decision was fatally flawed at the time it was made"). Accordingly, Section 5109A provides in relevant part as follows:

Veterans Benefits Administration Improvement Act of 1999, Congress included the findings that "[t]he accuracy of claims processing within the Veterans Benefits Administration has been a subject of concern to Congress and the Department of Veterans Affairs" and, "in 1998, initial review of veterans claims was accurate only 64 percent of the time." Veterans Benefits Administration Improvement Act of 1999, 145 Cong. Rec. S11803-03, § 2 (daily ed. Oct. 1, 1999). The award of interest would play a crucial role in addressing Congress' concerns regarding these issues since, if interest is not payable upon a finding of administrative (or clear and unmistakable) error, the VA has little incentive to make a proper determination in the first instance.

> (a) A decision by the Secretary under this chapter is subject to revision on the grounds of clear and unmistakable error. If evidence establishes the error, the prior decision shall be reversed or revised.
>
> (b) For the purposes of authorizing benefits, a rating or other adjudicative decision that constitutes a reversal or revision of a prior decision on the grounds of clear and unmistakable error has *the same effect as if the decision had been made on the date of the prior decision.*

38 U.S.C. § 5109A (emphasis added).[8] Clearly, the VA cannot give a corrected rating (here, made in 1993) "the same effect" that it would have had if it had been made on the date of the reversed rating (here, May 16, 1961) unless the VA adjusts the past-due benefits to account for the effects of the passage of time on their value. A dollar today obviously is worth much less than a dollar thirty years ago. *See, e.g., Erspamer v. Derwinski*, 1 Vet. App. 3, 10 (1990) (stating that "[p]ayment of benefits ten years after they were due could never serve as full compensation"). By the time the VA finally paid Mr. Smith in 1993 for his past-due benefits from 1961, inflation and the passage of time had eroded as much as eighty percent of their value.[9] In other words, *Mr. Smith received as little as one-fifth of the amount that he would have received if the VA had properly paid him at the time the benefits originally were due.* Again, to interpret Section 5109A as excluding interest defies the plain meaning of the

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[8] As noted by the Federal Circuit, Section 5109A is a codification of 38 C.F.R. § 3.105(a). *See* Apx 2 n.1; *Disabled American Veterans v. Gober*, 234 F.3d 682, 686 (Fed. Cir. 2000).

[9] For example, adjusting for inflation according to the Consumer Price Index, goods that cost $100 in 1961 cost $474 in 1993; conversely, goods that cost $100 in 1993 cost $21 in 1961. *See* Friedman, S. Morgan, http://www.westegg. com/ inflation, incorporating data from the *Historical Statistics of the United States* prior to 1975 and the annual *Statistical Abstracts of the United States* for years thereafter.

provision. It also is contrary to the canon that veterans benefits statutes must be construed in the beneficiaries' favor. *See King, supra.* In addition, there is no language in Section 5109A or any other pertinent veterans benefits statute that would conflict with or be rendered meaningless or superfluous by Section 5109A if it is interpreted to require the payment of interest.

Admittedly, this Court has indicated that the so-called "no-interest rule" provides an added gloss of strictness upon the principle that waivers of sovereign immunity must be strictly construed. *See Library of Congress v. Shaw*, 478 U.S. 310, 318 (1986). As articulated in *Shaw*, the no-interest rule provides that "federal statutes cannot be read to permit interest to run on a recovery against the United States unless Congress affirmatively mandates that result." 478 U.S. at 316. However, the no-interest rule should not be interpreted to require a court to collapse its review in such cases to a mere assessment of whether the word "interest" appears in an applicable statute. Such a superficial review elevates form over substance. Indeed, this Court has admonished against requiring Congress to adhere to such talismanic formulas in order to waive sovereign immunity. *See Franchise Tax Bd. of California v. U.S. Postal Service*, 467 U.S. 512, 521 (1984) (stating that "waiver of sovereign immunity is accomplished not by 'a ritualistic formula'; rather intent to waive immunity and the scope of such a waiver can only be ascertained by reference to underlying congressional policy"). *See also Chickasaw Nation v. United States*, 122 S.Ct. 528, 535 (2001) (stating that canons of statutory interpretation are not mandatory rules, but instead are guides "designed to help judges determine the Legislature's intent as embodied in particular statutory language") (citation omitted); *cf. Hopi Tribe v. Navajo Tribe*, 46 F.3d 908, 921-22 (9th Cir. 1995) (citing this Court's interpretive guidance in *Franchise Tax Bd.* and finding a waiver of an Indian tribe's sovereign immunity for interest even though the applicable statute did not expressly mention interest and despite the rule that such a waiver "cannot be implied but must be unequivocally

expressed").[10] Here, notwithstanding the absence of the word "interest" from Sections 503(a) and 5109A, Congress has in fact affirmatively authorized the payment of interest in cases of administrative error and required the payment of interest in cases of clear and unmistakable error.[11]

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[10] In addition, as discussed later in this petition, this Court has required the payment of interest in takings cases despite the lack of any mention of "interest" in the Fifth Amendment and, furthermore, this Court has required the payment of interest where Congress has authorized suits against Federal entities engaging in commercial activities by including a "sue and be sued" clause (again, with no mention of "interest") in the entities' enabling legislation. *See Shaw*, 478 U.S. at 317 n.5; *Loeffler v. Frank*, 486 U.S. 549, 554-57 (1988). Thus, the simple absence of the word "interest" from a statute is not dispositive.

[11] Regarding the authorization in Section 503(a) for the Secretary to grant "such relief on account of such error as the Secretary determines equitable, including the payment of moneys," the Federal Circuit's opinion states that "a statute's broad reference to 'equitable relief' does not constitute a waiver of the no-interest rule." Apx 3. Section 503(a), however, does not merely refer to equitable relief; instead, it more narrowly refers to equitable *monetary* relief, which plainly includes interest. Indeed, the only case cited by the Federal Circuit in this regard -- *Blake v. Califano*, 626 F.2d 891 (D.C. Cir. 1980) -- supports *Mr. Smith's* interpretation of Section 503(a). *Blake* involved a claim for interest under Title VII, which provides that a court may order such affirmative action as may be appropriate, including reinstatement or hiring of employees "or any other equitable relief as the court deems appropriate." 626 F.2d at 893, n.4. The court in *Blake* stated that, "[w]ithout some *further indication* in statutory language or legislative history, 'equitable relief' is too wide and general a category" on which to find a waiver for interest. *Id.* at 894 (emphasis added). The reference to equitable *monetary* relief in Section 503(a) is exactly the sort of "further indication" that *Blake* indicated is required -- particularly given that Section 503(a) addresses the correction of administrative errors in the dispensation of veterans benefits.

2. IN HOLDING THAT THE CANON OF STATUTORY CONSTRUCTION REQUIRING THE LIBERAL INTERPRETATION OF VETERANS BENEFITS STATUTES MUST YIELD TO THE CANON DISFAVORING WAIVERS OF SOVEREIGN IMMUNITY FOR INTEREST, THE FEDERAL CIRCUIT ERRONEOUSLY DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

As mentioned above, it is a long-standing principle that veterans benefits statutes must be liberally construed in favor of claimants. *See King*, 502 U.S. at 220 n.9 (noting "the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor"). *See also Boone v. Lightner*, 319 U.S. 561, 575 (1943) (stating that "[t]he Soldiers' and Sailors' Civil Relief Act is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation"); *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) (stating that the Selective Service Act "is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need" and "[o]ur problem is to construe the separate provisions of the Act as parts of an organic whole and give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits"); *Coffy v. Republic Steel Corp.*, 447 U.S. 191, 195-96 (1980) (stating that the Vietnam Era Veterans' Readjustment Assistance Act of 1974 "is to be liberally construed for the benefit of the returning veteran"); *Glover v. West*, 185 F.3d 1328, 1332 (Fed. Cir. 1999) (stating that the claimant "is no doubt correct in asserting that veterans' benefits statutes should be construed in a liberal, pro-claimant fashion"); *Hix v. Gober*, 225 F.3d 1377, 1380 (Fed. Cir. 2000) (stating that the court is

guided by "the general interpretive rule that veterans benefit statutes are construed liberally in favor of the veteran").

Accordingly, when interpreting veterans benefits provisions, courts must resolve any interpretive doubt in the veteran's favor. *See Brown*, 513 U.S. at 118 (referring to "the rule that interpretive doubt is to be resolved in the veteran's favor"). *See also Boyer v. West*, 210 F.3d 1351, 1355 (Fed. Cir. 2000) (stating that "we certainly agree . . . that when we find an ambiguity in a veterans' benefit statute, 'interpretive doubt is to be resolved in the veteran's favor'") (citations omitted); *Disabled American Veterans*, 234 F.3d at 692 (referring to "the doctrine governing the interpretation of ambiguities in veterans' benefits statutes -- that 'interpretive doubt is to be resolved in the veteran's favor'") (citation omitted).

Although application of this "interpretive doubt" rule in veterans benefits cases should have aided the Federal Circuit in construing Sections 503(a) and 5109A in Mr. Smith's favor, the court instead rejected the rule and held that it must yield to the canon of statutory construction disfavoring a waiver of the no-interest rule. Apx 4. This Court has not addressed whether the canon of statutory interpretation favoring veterans is trumped by the no-interest rule. The Federal Circuit's opinion below appears to be the first decision to do so. However, this Court did recently address a similar situation in *Chickasaw Nation v. United States*, 534 U.S. 84, 122 S.Ct. 528 (2001), which the Federal Circuit cited in its decision below. *See* Apx 4.

As here, *Chickasaw* involved the construction of two competing canons of statutory interpretation: first, the canon that Federal statutes are to be "liberally construed in favor of [Native American] Indians with ambiguous provisions interpreted to their benefit"; and, second, the canon that Federal statutes should not be interpreted as providing tax exemptions "unless those exemptions are clearly expressed." 122 S.Ct. at 535. The Court determined that it did not have to resolve which canon had primacy because it concluded that

the Tribes' interpretation of the statute at issue (addressing the payment of gambling-related taxes) was not reasonable in that it conflicted with the congressional intent clearly embodied in the statute. *Id.* However, the Court did indicate that the relative strength of such competing canons is not fixed or pre-determined and that the ultimate concern is a case-by-case determination of congressional intent:

> For one thing, canons are not mandatory rules. They are guides that "need not be conclusive." [Citation omitted.] They are designed to help judges determine the Legislature's intent as embodied in particular statutory language. And other circumstances evidencing congressional intent can overcome their force. . . .
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> . . . .
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> . . . Nor can one say that the pro-Indian canon is inevitably stronger -- particularly where the interpretation of a congressional statute rather than an Indian treaty is at issue. [Citation omitted.] This Court's earlier cases are too individualized, involving too many different kinds of legal circumstances, to warrant any such assessment about the two canons' relative strength.

Id. at 535-36. *See also Franchise Tax Bd.*, 467 U.S. at 521 (stating that the scope of a waiver of sovereign immunity "can only be ascertained by reference to underlying congressional policy"); *cf. Chickasaw*, 122 S.Ct. at 538-39 (O'Connor, J., dissenting) (stating that "[t]his Court has repeatedly held that, when these two canons conflict, the Indian canon predominates" and "[t]his Court has failed to apply the Indian canon to extend tax exemptions to the Nations only when nothing in the language of the underlying statute or treaty suggests the Nations should be exempted"); *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1462 (10th Cir. 1997) (concluding that "the canon of construction favoring Native

Americans controls over the more general rule of deference to agency interpretations of ambiguous statutes").

The Federal Circuit's conclusion in the present case that the veterans canon is trumped by the no-interest rule was flawed because the court failed to attempt to determine the congressional intent or policies behind Sections 503(a) or 5109A. *See* Apx 3-5. Had the Federal Circuit done so, numerous considerations demonstrate that the court would have had to conclude that the veterans canon has primacy over the no-interest rule in the interpretation of Sections 503(a) and 5109A. To begin with, Congress' intent is embodied in the text of both Sections 503(a) and 5109A, the plain meaning of which, as discussed above, supports Mr. Smith's interpretation. There also is no indication whatsoever of any congressional intent that interest should *not* be permitted under Sections 503(a) and 5109A. In addition, both statutes are veterans benefits provisions, which Congress is presumed to know should be interpreted in a pro-veterans fashion. This is not a case where a veteran is seeking a favorable interpretation of a generally-applicable statute (such as a tax provision) where Congress may not have specifically contemplated the circumstances of veterans. Moreover, Section 503(a) is directed at the *correction* of administrative *errors* and Section 5109A is directed at the *correction* of *clear and unmistakable errors*. Provisions addressing the correction of errors in the administration of veterans benefits--a situation regarding which Congress has expressed continuing concerns[12] -- should form the equitable core of a statutory scheme premised upon the liberal dispensation of benefits. In other words, if Congress were to prioritize the veterans benefits provisions to which the veterans canon should apply most strongly, Sections 503(a) and 5109A surely would be at the top of the list. This Court therefore should find that, at least regarding Sections 503(a) and 5109A, the canon of statutory interpretation favoring veterans must *not*

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[12] *See* note 7, *supra*.

yield to the no-interest rule and that, in accordance with the veterans canon, any ambiguity in Sections 503(a) and 5109A must be construed in Mr. Smith's favor.

3. IF THE NO-INTEREST RULE WOULD OTHERWISE PRECLUDE MR. SMITH'S RECOVERY OF INTEREST IN THE EGREGIOUS CIRCUMSTANCES OF THIS CASE, THIS COURT SHOULD CREATE AN ADDITIONAL EXCEPTION TO THE RULE AND PERMIT THE PAYMENT OF INTEREST UNDER SECTIONS 503(a) AND 5109A

This Court previously has concluded that the no-interest rule does not apply in two circumstances. First, in takings cases under the Fifth Amendment, the United States is required to pay interest on the value of the property from the date of the taking despite the lack of an express reference to "interest" in the Fifth Amendment. *See Shaw*, 478 U.S. at 317 n.5.[13] Second, the Court has permitted the recovery of interest from the United States where Congress has authorized suits against Federal entities engaging in commercial activities by including a "sue and be sued" clause in the

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[13] The Court has interpreted the constitutional reference to "just compensation" to entitle claimants to be put in as good a position as they would have been if the Government had not taken their property -- which, of course, includes pre-judgment interest covering the period of the taking. *See Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 306 (1923) (holding that "the owner is not limited to the value of the property at the time of the taking; he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking" and "[i]nterest at a proper rate is a good measure by which to ascertain the amount so to be added"). Since Congress similarly requires the VA under Section 5109A to give a corrected decision "the same effect" as if it had been made on the date of the erroneous decision, veterans who have suffered a clear and unmistakable error by the VA similarly should be entitled to the payment of interest on past-due benefits.

entities' enabling legislation. *See Loeffler*, 486 U.S. at 554-57.

In addition, courts in at least two circuits have recognized a third exception to the no-interest rule in the context of civil forfeiture proceedings.[14] Specifically, these courts have recognized a distinction in such proceedings between interest as an element of damages -- which would likely fall within the ambit of the no-interest rule -- and interest as a part of the seized *res* that the Government must return to the owner. For example, in *United States v. $277,000 U.S. Currency*, the Government unsuccessfully sought forfeiture of cash which local police had seized and turned over to the United States, which then held the money for over four years before a U.S. district court ordered it returned, with interest, to its rightful owner. 69 F.3d 1491, 1492 (9th Cir. 1995). The Ninth Circuit Court of Appeals held that, while sovereign immunity generally precludes Government liability for interest accruing prior to judgment, the United States was required to "disgorge . . . along with the property itself" any interest it actually or constructively earned on the property before judgment. *Id.* at 1492. The court thus distinguished interest in such cases from those involving pre-judgment interest as a form of damages, stating that "[t]here is no element here of forcing the government to pay for damage it has done, only that it must disgorge benefits that it has actually and calculably received from an asset that it has been holding improperly." *Id.* at 1498.[15] *See also*

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[14] As noted in the Federal Circuit's opinion below, other circuits have refused to adopt this exception. *See* Apx 5, n.2.

[15] The fact that the United States had deposited the seized money into a Treasury account upon which interest did not accrue and, therefore, had not actually earned interest on the funds, did not alter the court's conclusion that the United States had realized benefits that were part of the *res*. The court held that possession of the funds directly benefited the United States "in a manner that is completely equivalent to the earning of interest." 69 F.3d at 1495. Specifically, "from the point of view of government financial management, all financial assets in the hands of the

United States v. $515,060.42 in U.S. Currency, 152 F.3d 491, 504 (6th Cir. 1998) (stating that, "to the extent that the Government has actually or constructively earned interest on seized funds, it must disgorge those earnings along with the property itself when the time arrives for a return of the seized *res* to its owner"); *United States v. $40,000 in U.S. Currency*, No. 97-1911(SEC), 1998 U.S. Dist. LEXIS 14649, at *3 (D. P.R. Sep. 1, 1998) (stating that "[t]he Supreme Court's holding in [*Shaw*] appears to be clearly limited to cases in which the Government is subject to damages awards, not cases such as the instant one where the Government is simply disgorging any benefits it may have derived from an improper source"); *Brooks v. United States*, 980 F.Supp. 321, 322 (E.D. Mo. 1997) (finding that "the government is liable for the interest actually accrued, or if the funds were placed in a [non-interest bearing] Treasury account, the constructively-earned interest at the government's alternative borrowing rate from the time the currency was seized until it was returned).

If the no-interest rule would otherwise preclude Mr. Smith's recovery of interest in the egregious circumstances of this case, this Court should create an additional exception to the rule and permit the payment of interest under Sections 503(a) and 5109A. Although the Federal Circuit concluded that Mr. Smith's case is not analogous to the recognized exceptions (Apx 6) and that his situation is not equally worthy of an award of interest (Apx 5), Mr. Smith strongly disagrees. Mr. Smith was entitled to receive more than $200,000 in disability benefits for service-connected blindness that the VA erroneously withheld for over thirty years. Mr. Smith's case is compelling to say the least. In addition, as in the civil forfeiture cases, Mr. Smith is not seeking interest in the form

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government are a means by which the government does not have to borrow equivalent funds" and, therefore, does not have to pay interest on the amount that it otherwise would have borrowed. *Id.* Thus, the court concluded that "the government obtained tangible and calculable financial benefit from the retention of [the] money" and "[t]his is the money that is constructively part of the *res*, and that must be returned." *Id.* at 1496.

of damages in an action against the United States. Instead, he merely is seeking the *full current value* of disability benefits that the VA improperly withheld and benefited from for more than three decades. Not permitting Mr. Smith to be made whole from this error also is contrary to the statutory scheme of generous and liberally-construed disability benefits. In fact, the basis for this Court's recognition of the commercial activities exception to the no-interest rule bears a striking similarity to Mr. Smith's case. This Court in *Loeffler* stated that, where Congress has waived the sovereign immunity of certain Federal entities by including "sue and be sued" provisions in their enabling legislation, such waivers should be "liberally construed." *See Loeffler*, 486 U.S. at 554 (*citing FHA v. Burr*, 309 U.S. 242, 245 (1940)). Since veterans benefits statutes similarly must be liberally construed, this Court similarly should find that the no-interest rule does not apply here and that Congress therefore has waived sovereign immunity for the payment of interest under Sections 503(a) and 5109A.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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United States Court of Appeals for the Federal Circuit

01-7050

CLAUDUS G. SMITH,
Claimant-Appellant,

v.

ANTHONY J. PRINCIPI,
Secretary of Veterans Affairs,
Respondent-Appellee.

DECIDED: March 4, 2002

Before LOURIE, CLEVENGER, and GAJARSA, Circuit Judges.

LOURIE, Circuit Judge.

Claudus G. Smith appeals from a decision of the United States Court of Appeals for Veterans Claims holding that he was not entitled to interest on a retroactive award of benefits. *Smith v. Gober*, 14 Vet. App. 227 (2000). Because the court did not err in applying the "no-interest rule," we affirm.

BACKGROUND

In 1957, the Department of Veterans Affairs ("DVA") granted Mr. Smith a disability rating for eye degeneration at 70%. In 1961, the DVA confirmed that rating decision. Smith later challenged the 1961 decision on the ground that it was based upon a clear and unmistakable error ("CUE"). In 1993, the DVA granted Smith's CUE claim, holding that the 1961 disability rating should have been 100%. The DVA accordingly awarded Smith past-due monthly compensation from 1961, totaling over $200,000, but declined to award interest on the delayed payments.

Smith appealed the decision not to award interest to the Board of Veterans' Appeals ("BVA"), which dismissed the appeal for lack of jurisdiction on the ground that no statute authorized the DVA to pay interest to Smith. Smith then appealed to the United States Court of Appeals for Veterans Claims, which held that the BVA erred in dismissing the appeal, but that the error was harmless. The court held that only express statutory language can waive the government's sovereign immunity from the payment of interest (*i.e.*, the "no-interest rule") and that the general language of 38 U.S.C. § 503(a), which broadly authorizes the Secretary of Veterans Affairs to provide any "equitable" relief, including "the payment of money," does not constitute such a waiver. The court further held that 38 C.F.R. § 105(a), which provides that a revision of an earlier benefit decision on the ground of CUE shall have the "same effect" as if the revision had been made on the date of the original decision, was similarly unhelpful to Smith. Smith timely appealed to this court. We have jurisdiction pursuant to 38 U.S.C. § 7292.

DISCUSSION

We review a statutory interpretation by the Court of Appeals for Veterans Claims *de novo*. *Dambach v. Gober*, 223 F.3d 1376, 1380 (Fed. Cir. 2000). We review the court's interpretation of a regulation to determine whether it was "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law." 38 U.S.C. § 7292(d)(1)(A).

Smith argues that §§ 503(a) and 5109A(b),[1] are waivers of the no-interest rule. Smith urges that those statutes must be interpreted, and any interpretative doubt resolved, in favor of the veteran. Smith also calls to our attention a number of public policy reasons weighing against the no-interest rule in this case. Finally, Smith contends that his factual situation justifies an exception to the no-interest rule because

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[1] 38 U.S.C. § 5109A(b) is a statutory codification of the relevant part of 38 C.F.R. § 3.105(a).

exceptions have been made with respect to (1) commercial enterprises of a government body; (2) takings; and (3) asset forfeitures. Smith does not argue that he comes within any of these exceptions, only that he is similarly deserving of an exception.

The DVA responds that waivers of the no-interest rule must be strictly construed and that neither § 503(a) nor § 5109A(b) is sufficiently explicit to constitute a waiver. The DVA further responds that ambiguous statutory language cannot impliedly waive the no-interest rule, nor can public policy be a ground for waiving sovereign immunity from the payment of interest. Finally, the DVA contends that Smith's claim is distinguishable from the recognized exceptions to the no-interest rule.

We conclude that there has been no waiver of the no-interest rule in § 503(a) or § 5109A(b). Section 503(a) outlines the relief due to a veteran who has been the victim of an error by the DVA:

> If the Secretary determines that benefits administered by the Department have not been provided by reason of administrative error on the part of the Federal Government or any of its employees, the Secretary may provide such relief on account of such error as the Secretary determines *equitable*, including the payment of moneys to any person whom the Secretary determines is *equitably* entitled to such moneys.

38 U.S.C. § 503(a) (emphasis added). Section 5109A(b) addresses the case of CUE more specifically:

> For the purposes of authorizing benefits, a rating or other adjudicative decision that constitutes a reversal or revision of a prior decision on the grounds of clear and unmistakable error has the *same effect* as if the decision had been made on the date of the prior decision.

38 U.S.C. § 5109A (emphasis added). Neither statute mentions interest, and that deficiency is controlling in this case. A waiver of the no-interest rule must be express. *Library of Congress v. Shaw*, 478 U.S. 310, 314 (1986); *United States v. N.Y. Rayon Importing Co.*, 329 U.S. 654, 659 (1947). Accordingly, a statute's broad reference to "equitable relief" does not constitute a waiver of the no-interest rule. *See Blake v. Hotson*, 626 F.2d 891, 894-95 (D.C. Cir. 1980) (holding that the broad authorization for 'other equitable relief' in 42 U.S.C. § 2000e-5(g) is insufficient to constitute a waiver of the no-interest rule in Title VII cases). Furthermore, ambiguity in a statute cannot constitute a waiver. *See N.Y. Rayon Importing*, 329 U.S. at 659 ("[T]here can be no consent by implication or by use of ambiguous language."). Applying these principles to the statutes at issue, it is clear that § 503(a)'s reference to "equitable" relief cannot be a waiver of the no-interest rule. Similarly, § 5109A(b)'s "same effect" language, which is at best ambiguous as to whether it refers to missed benefit payments only or missed benefit payments plus interest, is likewise not a clear waiver of the no-interest rule.

Smith's appeal to public policy favoring liberal dispensation of benefits to veterans cannot change our conclusion. Public policy, "no matter how compelling," cannot be a ground for finding a waiver in the absence of express statutory language. *Shaw*, 478 U.S. at 320-21. Smith's policy arguments essentially ask us to reform the law, but that is the role of Congress, not this court. Moreover, Smith's invocation of the canon of statutory construction in favor of veterans must similarly yield to the canon of statutory construction strictly disfavoring a waiver of the no-interest rule absent an express indication to the contrary. *Cf. Chickasaw Nation v. United States*, 122 S. Ct. 528, 535 (2001) (holding that the canon in favor of Indian tribes is overcome by the canon that tax exemptions can be found only when "clearly expressed" in the statutes). In sum, only express language can waive the no-interest rule, and the

statutes asserted in this case lack such express language of waiver.

Finally, while Smith concedes that he does not qualify for one of the three exceptions to the no-interest rule, he argues that his situation is equally worthy of an award of interest. We disagree. The established exceptions are quite different from a claim for interest on a CUE award. First, the commercial enterprise exception does not apply to the DVA as an administrator of veterans' benefits. *See Loeffler v. Frank*, 486 U.S. 549, 554 (1988) (explaining that when Congress creates an agency as a "sue and be sued" entity, Congress thereby waives sovereign immunity from the normal incidents of suit, such as interest on a damages award). The DVA is a "sue and be sued" agency falling within the scope of the commercial enterprise exception only in its capacity as a lender or guarantor of housing and small business loans. 38 U.S.C. § 3720(a)(1) (1991).

Second, takings cases stand on a very different foundation, as an award of interest in those cases is based on an interpretation of constitutional text ("just compensation") to which the requirement of an express waiver of sovereign immunity by Congress is not applicable. *Shaw*, 478 U.S. at 317. Smith does not argue that the deprivation of interest on his CUE award constitutes a taking. Third, asset forfeiture cases are also quite different. Although most circuit courts have refused to recognize asset forfeiture as an exception to the no-interest rule, some have done so under a disgorgement theory.[2] Even if we were to agree that such an exception

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[2] Four circuit courts have refused to award interest on wrongly seized money. *Larson v. United States*, 274 F.3d 643, 647-48 (1st Cir. 2001); *Ikelionwu v. United States*, 150 F.3d 233, 238-39 (2d Cir. 1998); *United States v. $7,990 U.S. Currency*, 170 F.3d 843, 845 (8th Cir. 1999); *United States v. $30,006.25 U.S. Currency*, 236 F.3d 610, 613 (10th Cir. 2000), *cert. denied* 122 S. Ct. 130 (2001). However, the Sixth and Ninth Circuits have awarded interest as a disgorgement of the wrongly seized res. *United States v. $277,000 U.S. Currency*, 69 F.3d 1491 (9th Cir. 1995); *United States v. $515,060 U.S. Currency*, 152 F.3d 491 (6th Cir. 1998). The

exists, Smith's claim is quite different from an asset forfeiture case. A veteran who prevails on a CUE claim has no entitlement to missed benefits until his CUE claim has been adjudicated in his favor; the government has therefore not wrongly seized his benefits, and his CUE award is not a disgorgement of that award by the government. In summary, Smith's case is not analogous to the recognized exceptions to the no-interest rule, and we are powerless to grant a benefit not provided for by law.

CONCLUSION

The Court of Appeals for Veterans Claims did not err in holding that Smith is not entitled to interest on his CUE award. Accordingly, we

AFFIRM.

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circuit split is of diminishing significance, as Congress has recently amended the forfeiture statute to allow prospectively the recovery of interest. 28 U.S.C. § 2465(b)(1)(C) (2001).

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 98-255

Claudus G. Smith,

Appellant,

v.

Hershel W. Gober,
Acting Secretary of Veterans Affairs,

Appellee.

On Appeal from the Board of Veterans' Appeals

(Decided December 22, 2000)

Before FARLEY, IVERS, and GREENE, Judges.

IVERS, *Judge*: The veteran, Claudus G. Smith, appeals from a December 16, 1997, Board of Veterans' Appeals (BVA or Board) decision that dismissed, for lack of jurisdiction, a claim for payment of accrued interest on an award of past-due disability benefits. Record (R.) at 5. Both the veteran and the Secretary have submitted briefs. Counsel for the veteran entered an appearance in this matter through the pro bono program. The Court wishes to compliment counsel on his presentation in this matter and thank him for his service to the veteran and thereby to this Court. The Court notes that counsel for the veteran requested oral argument in his brief. Appellant's Brief (Br.) at 1. The Court finds that "oral argument would not materially assist in the disposition of this appeal." *Mason v. Brown*, 8 Vet.App. 44, 59. This appeal is timely, and the Court has jurisdiction pursuant to 38 U.S.C. §§ 7252(a) and 7266(a).

On August 31, 2000, the Court issued an opinion in this case, *Smith v. Gober*, 14 Vet.App. 96 (2000), that affirmed the

Board's December 16, 1997, decision. The Court denied the veteran's motion for reconsideration on October 31, 2000. Judgment was recalled in this case pursuant to *In Re: Veterans Claims Assistance Act of 2000*, U.S. Vet. App. Misc. Order No. 4-00 (Nov. 13, 2000) (en banc) because of the recent enactment of the Veterans Claims Assistance Act of 2000, Pub. L. No. 106-475, 114 Stat. 2096, (Nov. 9, 2000) [hereinafter VCAA]. Therefore, the Court will withdraw its August 31, 2000, opinion and issue this opinion in its stead. For the reasons set forth below, the Court will affirm the BVA's December 16, 1997, decision.

I. FACTS

The veteran served in the U.S. Air Force from May 1950 to May 1954, and from November 1955 to August 1957. R. at 13. In a February 26, 1958 rating decision, the veteran was granted service connection for chorio-retinal eye degeneration with a disability rating of 70% effective August 24, 1957. R. at 8. On February 2, 1961, the veteran's eyes were examined at a VA medical center in Oklahoma City, Oklahoma, and he was diagnosed with "gun barrel vision of 5 degrees bilateral secondary to Retinitis Pigmentosa." *Id.* On February 20, 1961, the rating board requested reexamination of the veteran by two eye specialists regarding the veteran's diagnosis of retinitis pigmentosa. On May 16, 1961, after a review of the February 20 examination results, the regional office (RO) continued the 70% evaluation based on the examination of the two ophthalmologists. R. at 8.

A January 1, 1992 rating decision granted the veteran 100% disability for chorio-retinal degeneration from November 8, 1991, the date of his claim for an increased rating. *Id.* On April 13, 1993, the Board found that the May 16, 1961, rating decision contained clear and unmistakable error. R. at 12. The RO then awarded the veteran a 100% rating for chorio-retinal eye degeneration; special monthly compensation for blindness in both eyes with visual acuity of

50/200 or less, effective February 2, 1961; and special monthly compensation for blindness in both eyes having light perception only, effective November 8, 1991. R. at 8-10, 12-13, 15-18, 20. The veteran, after verification of his military retirement pay, was awarded past due benefits for VA disability compensation in the amount of $203,497.31 for the period from February 2, 1961, to July 31, 1993. R. at 22-25.

On March 26, 1994, the veteran wrote a letter to VA requesting that interest be paid on the retroactive benefits awarded in April 1993. R. at 27. The RO in Muskogee, Oklahoma, informed the veteran in a April 22, 1994, letter that VA regulations "do not provide for interest to be paid on retroactive awards." *Id.* In a February 26, 1996, letter the veteran again requested payment of interest on his past-due benefits. R. at 35. Again the RO, in a March 5, 1996, letter, informed the veteran that VA regulations did not provide for the payment of interest on a retroactive claim. R. at 39. On April 14, 1996, the veteran wrote another letter expressing displeasure that he had not received formal notice of a VA decision concerning the payment of interest on his past-due benefits. R. at 44. The RO, in a May 29, 1996, response, treated the April 14, 1996, letter as a Notice of Disagreement. R. at 46-47. In July 1996, the veteran received a Statement of the Case. R. at 46-51. The veteran appealed his case to the Board. R. at 53-57.

In October 1996, the veteran had an RO hearing, where he reiterated his belief that he was entitled to payment of interest on his past due benefits. R. at 59. The Board, in the December 16, 1997, decision here on appeal, determined:

> Absent a statute authorizing the payment of interest by the VA Secretary on awards of disability compensation, no law or regulation affecting the provisions of benefits by the VA to veterans or dependents or survivors administered by the VA is for consideration. The merits of the veteran's claim cannot be addressed by the Board as we are without

jurisdiction. As there is not an issue appropriate for appellate review by this Board, the appeal must be dismissed.

R. at 4.

II. ANALYSIS

A. Jurisdiction

The Board erroneously dismissed the veteran's claim for lack of jurisdiction. The Board conducted a full review of the interest issue and found that it lacked jurisdiction to review such a claim. R. at 3-4. This Court has held that "the BVA must review all issues which are reasonably raised from a liberal reading of the appellant's substantive appeal." *Rivers v. Gober*, 10 Vet.App. 469, 471(1997) (quoting *Myers v. Derwinski*, 1 Vet.App. 127, 129 (1991)); *see Godfrey v. Brown*, 7 Vet.App. 398, 410 (1995). If the Board had liberally framed the issue in terms of whether the appellant had received the maximum monetary award to which he was legally entitled, including interest, or whether there were any amounts omitted in the calculation of the past-due benefits, including interest, the claim would have been within the Board's jurisdiction pursuant to 38 U.S.C. § 7104. Such error by the Board was harmless, however, because the veteran was not entitled to the payment of interest as a matter of law.

B. Payment of Interest

The payment of interest on past due benefits is a case of first impression before this Court. This Court reviews questions of law de novo without any deference to the Board's conclusion of law. *See* 38 U.S.C. § 7261(a)(1); *see also Hensley v. West*, 212 F.3d 1255 (Fed. Cir. 2000); *Butts v. Brown*, 5 Vet.App. 532, 539 (1993) (en banc). The U. S. Supreme Court has clearly held that "[f]or well over a century, this Court, executive agencies, and Congress itself consistently have recognized that federal statutes cannot be

read to permit interest to run on a recovery against the United States unless Congress affirmatively mandates that result." *Library of Congress v. Shaw*, 478 U.S. 310, 315 (1986). The Supreme Court has interpreted the no-interest rule strictly.

> There can be no consent by implication or by use of ambiguous language. Nor can intent on the part of the framers of a statute or contract to permit the recovery of interest suffice where the intent is not translated into affirmative statutory or contractual terms. The consent necessary to waive the traditional immunity must be express, and it must be strictly construed.

U.S. v. N.Y. Rayon Importing Co., 329 U.S. 654, 659 (1947); *see also McMahon v. U.S.*, 342 U.S. 25, 27 (1951) ("[S]tatutes which waive immunity of the United States from suit are to be construed strictly in favor of the sovereign."); *Fidelity Construction Co. v. United States*, 700 F.2d 1379 (Fed. Cir. 1983) ("Not only may the consent not be implied, but even a seemingly explicit consent will not be effective if the language used appears too sweeping and contrary to the overall statutory scheme as judicially deduced."). The veteran concedes that none of the exceptions to the no-interest rule applies in this case. Appellant's Br. at 7.

The veteran rests his case upon the premise that 38 U.S.C. § 503(a) is an express statutory authorization for the payment of interest. The veteran contends that "[i]ndisputably, 38 U.S.C. § 503 waives sovereign immunity and statutorily authorizes the Secretary to provide *any* form of adjustment to an award of veterans benefits that he deems appropriate in cases, like this one, where there has been administrative error by the VA." Appellant's Br. at 7. Section 503(a), of title 38, United States Code, provides:

> If the Secretary determines that benefits administered by the Department have not been provided by reason of administrative error on the part of the Federal Government or any of its

> employees, the Secretary may provide such relief on account of such error as the Secretary deems equitable, including the payment of moneys to any person whom the Secretary determines is equitably entitled to such moneys.

The veteran asks the Court to infer from the general language of section 503 that Congress has expressly consented to a waiver of sovereign immunity allowing the payment of interest. This we cannot do. The Court cannot infer from the general language granting the Secretary the power of equitable relief that Congress has expressly granted the Secretary the authority to pay interest on past-due claims. Any ambiguity in the language of the statute that the veteran relies upon to support his position must be strictly construed in favor of the sovereign, as the Supreme Court clearly instructed in *N.Y. Rayon Importing Co., supra.* It is unfortunate that the veteran for a period of over thirty years has been erroneously denied his benefits, but there is no statutory authority under which the Secretary may pay the veteran interest on those past due benefits.

Since Congress did not expressly waive sovereign immunity in section 503, the veteran's argument that the Secretary expressly delegated his section 503 power to the Board in 38 C.F.R. § 3.105(a) is without merit and need not be considered further by the Court. Appellant's Br. at 9. The Secretary cannot delegate authority that he does not possess. Even assuming arguendo that the Secretary has the authority, he clearly has not delegated such authority. Section 2.7(c) of title 38, Code of Federal Regulations, expressly states that "[t]he authority to grant the equitable relief, referred to in paragraphs (a) and (b) of this section, has not been delegated to and is reserved to the Secretary." The Court holds that section 503 does not authorize the Secretary pay interest on past due benefits.

C. Equitable Relief

The veteran requests, in the alternative, that the Court direct the Board to order the Secretary, under his equitable powers, to adjust his past due benefits award to include the payment of interest. Appellant's Br. at 16-18. It is well established that this Court is a court of law, and not of equity, and we cannot provide equitable relief. *Taylor v. West*, 11 Vet.App. 436, 440 (1998). The Secretary's authority to grant equitable relief under section 503 is wholly within the Secretary's discretion, and the Court lacks jurisdiction even to review the exercise of the Secretary's equity discretion. *Zimick v. West*, 11 Vet.App. 45, 50-51 (1998). Since the authority to grant equitable relief is discretionary the Court will not remand a matter on that ground. *Erspamer v. Brown*, 9 Vet.App. 507, 512 (1996). The Court also does not have the power to compel the Secretary to exercise his authority to grant equitable relief as the veteran requests. *Zimick*, 11 Vet.App. at 50-51.

Even if the Secretary were inclined to grant the veteran equitable relief, he would not lawfully be permitted to do so. Because "the remedy sought is a monetary award against the U.S. government, and particularly where Congress has enacted an intricate and all-encompassing statutory scheme, such expenditures must be specifically authorized by statute." *Malone v. Gober*, 10 Vet.App. 539, 542 (1997); *see also OPM v. Richmond*, 496 U.S. 414, 424 ("[T]he payment of money from the [Federal] Treasury must be authorized by statute.").

Congress has enacted a comprehensive statutory scheme for the payment of veterans benefits. In this case, there is no statute or regulation that authorizes the Secretary to pay interest on past due benefits under any circumstances, to include the exercise of his equitable powers.

The Court finds that the recent enactment of the VCAA, referenced *supra*, does not affect the issue decided in this case

concerning whether a federal statute allows the payment of interest on past due benefits. Therefore, there is no reason to consider the VCAA in deciding this case.

III. CONCLUSION

After consideration of the appellant's brief, the Secretary's brief, and the record, the Court holds that the appellant has not demonstrated that the Board committed either legal or factual error which would warrant reversal or remand with respect to the payment on interest on the veteran's past due claims. Section 503(a) does not expressly authorize the Secretary to pay interest on past due claims; therefore, the veteran is not entitled such a payment. The Court is also satisfied that the Board decision fulfills the "reasons or bases" requirements of 38 U.S.C. § 7104(d)(1). Accordingly, the December 16, 1997, Board decision is AFFIRMED.

BOARD OF VETERANS' APPEALS
Department of Veterans Affairs
Washington, DC 20420

IN THE APPEAL OF

CLAUDUS G. SMITH C 18 757 950

DOCKET NO. 96-33 537) DATE DEC 16 1997
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)

On appeal from the Department of Veterans Affairs
Regional Office in Muskogee, Oklahoma

THE ISSUE

Whether the veteran is entitled to interest on the payment of retroactive Department of Veterans Affairs disability compensation pursuant to a grant of benefits based on clear and unmistakable error in a May 1961 rating decision.

REPRESENTATION

Appellant represented by: Blinded Veterans Association

WITNESS AT HEARING ON APPEAL

Appellant

INTRODUCTION

The veteran had active service from May 1950 to May 1954 and from November 1955 to August 1957.

This appeal arises from an April 1994 letter from the Department of Veterans Affairs (VA) Regional Office, Muskogee, Oklahoma, in which it was stated that Department of Veterans Affairs (VA) regulations do not provide for interest to be paid on retroactive awards.

CONTENTIONS OF APPELLANT ON APPEAL

The veteran contends that he should receive interest on his back pay award as the back pay covered a period dating back to 1961. He asserts that, as the award was based upon a finding of clear and unmistakable error, for the corrected decision under 38 C.F.R. §3.105(a) (1997) to be treated as if it had been made on the date of the reversed decision, interest needs to be paid on the funds which had been unpaid for many years. He further asserts that several court decisions, including *Loeffler v. Frank*, 486 U.S. 549, 108 S.Ct. 1965, 100 L.Ed.2d 549 (1988); *National Home for Disabled Volunteer Soldiers v. Parrish*, 229 U.S. 494, 33 S.Ct. 944, 57 L.Ed. 1296 (1913) and *Vail et. al. v. Brown*, 841 F.Supp. 909 (1994), as well as a Federal statute, demonstrate that government agencies can and should be required to pay interest.

DECISION OF THE BOARD

The Board of Veterans' Appeals (Board), in accordance with the provisions of 38 U.S.C.A. § 7104 (West 1991 & Supp. 1997), has reviewed and considered all of the evidence and material of record in the veteran's claims file. Based on its review of the relevant evidence in this matter, and for the following reasons and bases, it is the decision of the Board that the appeal is dismissed.

FINDING OF FACT

The veteran alleges that he is entitled to interest on the payment of retroactive VA disability compensation pursuant to a grant of benefits based on clear and unmistakable error in a May 1961 rating decision.

CONCLUSION OF LAW

The matter of the claim of interest on the payment of retroactive VA disability compensation pursuant to a grant of benefits based on clear and unmistakable error does not involve a question of fact or law related to the provision of benefits within the meaning of the 38 U.S.C.A. § 511. 38 U.S.C.A. §§ 511, 7104 (West 1991 & Supp. 1997); 38 C.F.R. § 20.101 (1997).

REASONS AND BASES FOR FINDING AND CONCLUSION

The veteran has contended that he should receive interest on his back pay award as the back pay covered a period dating back to 1961. The Board has jurisdiction to decide questions of law and fact necessary to decisions under a law that affects the provision of benefits by the VA to veterans or the dependents or survivors of veterans. 38 U.S.C.A. §§ 511, 7104. While questions such as a veteran's basic eligibility for VA benefits, his entitlement to VA disability compensation or whether there had been clear and unmistakable error in a rating decision are within the Board's jurisdiction, these are not the benefits being sought by the veteran.

The record shows that, in April 1993, the VA confirmed that there had been clear and unmistakable error in a May 1961 rating decision and concluded that the veteran should be granted a 100 percent disability evaluation for chorio-retinal degeneration as well as special monthly compensation for blindness in both eyes with visual acuity of 50/200 or less, effective from February 2, 1961, as well as special monthly compensation for blindness in both eyes having light

perception only, effective from November 8, 1991. The record also shows that, following verification of the veteran's military retired pay, he was awarded $203,497.31 in VA disability compensation covering the period from February 2, 1961, to July 31, 1993.

The veteran does not disagree with the amount of the VA disability compensation paid as the result of the decision which determined that there had been clear and unmistakable error in the May 1961 rating decision, his current appeal is on the issue of whether interest on that award should be paid as well. 38 U.S.C.A. § 1110 authorizes the VA Secretary to make payments of disability compensation. However, there is no statute authorizing the Secretary to make payments of interest on any award of VA disability compensation.

The veteran correctly asserts that, under certain circumstances, such as where authorized by statute, interest has been paid by certain government agencies. However, the statute cited by the veteran is limited to the Internal Revenue Service and in each of the cited court cases the commercial activity exemption, allowing for the payment of interest where the government "cast off the cloak of sovereignty and assumed the status of a private commercial enterprise" was applied. *See Vail*, at 915. However, as here, where the commercial activity exemption is not for application and, absent Constitutional requirements, an allowance for the payment of interest on a claim against the United States requires an explicit waiver of sovereign immunity by Congress. *Fidelity Construction Co. v. United States*, 700 F.2d 1379, 1783 (Fed Cir. 1983).

Absent a statute authorizing the payment of interest by the VA Secretary on awards of disability compensation, no law or regulation affecting the provision of benefits by the VA to veterans or the dependents or survivors of veterans administered by the VA is for consideration. The merits of the veteran's claim can not be addressed by the Board as we are without jurisdiction. As there is not an issue appropriate

for appellate review by this Board, the appeal must be dismissed. 38 U.S.C.A. §§ 511, 7104; 38 C.F.R. § 20.101.

ORDER

In the absence of an issue appropriate for appellate review, the appeal is dismissed.

s/
HILARY L. GOODMAN
Acting Member, Board of Veterans' Appeals

NOTICE OF APPELLATE RIGHTS: Under 38 U.S.C.A. § 7226 (West 1991 & Supp. 1997), a decision of the Board of Veterans' Appeals granting less than the complete benefit, or benefits, sought on appeal is appealable to the United States Court of Veterans Appeals within 120 days from the date of mailing of notice of the decision, provided that a Notice of Disagreement concerning an issue which was before the Board was filed with the agency of original jurisdiction on or after November 18, 1988. Veterans' Judicial Review Act, Pub. L. No. 100-687, § 402, 102 Stat. 4105, 4122 (1988). The date which appears on the face of this decision constitutes the date of mailing and the copy of this decision which you have received is your notice of the action taken on your appeal by the Board of Veterans' Appeals.